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(2)

No. 07-19

IN THE

Supreme Court of the United States

DEPARTMENT OF THE ARMY,

Petitioner,

v.

JOHN E. KIRKENDALL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), this Court held that "the same rebuttable presumption of equitable tolling applicable to suits against private defendants should also apply to suits against the United States." *Id.* at 95-96. Eight years later, Congress enacted the Veterans Employment Opportunities Act of 1998 (VEOA), which provides a mechanism for veterans to vindicate their veterans-preference rights in suits against the federal government. The question presented is:

May the 15-day period for a veteran to file a VEOA lawsuit in the Merit Systems Protection Board be equitably tolled in at least some cases?

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BRIEF IN OPPOSITION

Respondent John E. Kirkendall respectfully opposes the United States' petition for a writ of certiorari.

INTRODUCTION

While this Nation's military fights simultaneous wars in Iraq and Afghanistan, the United States asks this Court to hold that Congress clearly forbade *all* of this Nation's veterans in *all* cases from obtaining equitable tolling of the 15-day period for filing a veterans-preference claim in the Merit Systems Protection Board. But the en banc Federal Circuit, which is expert in these matters, reached a contrary judgment via a garden-variety, careful, and entirely correct application of the multi-factor, context-sensitive test mandated by this Court's equitable tolling precedents—principally *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990). The decision below is limited to the distinctive statutory scheme at issue, is interlocutory, and implicates no circuit conflict. It does not merit this Court's review.

Unable to show why this Court should grant plenary review, the government contends that the Court should grant, vacate, and remand (GVR) in light of *Bowles v. Russell*, 127 S. Ct. 2360 (2007). But a GVR is wholly inappropriate in this case. The Federal Circuit's judgment rests on this Court's settled equitable tolling precedents—decisions that *Bowles* did not so much as mention, let alone overrule. *Bowles* simply reaffirmed the longstanding rule that the time within which to appeal an *Article III district court's* decision is "mandatory and jurisdictional." This case, by contrast, involves the time for transferring an adjudication from one *administrative body* to

another. The Federal Circuit was fully aware of the rule that the time to appeal a district court's decision is jurisdictional, but squarely rejected the relevance of that rule in this case. There is no reasonable probability it would change that conclusion were this case remanded for further consideration in light of *Bowles*.

In any event, even were *Bowles* arguably relevant to the Federal Circuit's ruling, this Court should still not GVR in light of *Bowles*. The Federal Circuit remanded this case to the Board both so that Mr. Kirkendall could demonstrate that he is entitled to equitable tolling on his Veterans Employment Opportunities Act of 1998 (VEOA) claim, and for Mr. Kirkendall to have the hearing on his separate Uniformed Services Employment and Reemployment Rights Act (USERRA) claim to which he is entitled. At the conclusion of those proceedings, the Federal Circuit would have ample opportunity to reconsider its equitable tolling holding in light of *Bowles* should Mr. Kirkendall prevail. A GVR in light of *Bowles* now, however, would gratuitously delay the hearing that the Board has, for years, denied Mr. Kirkendall on his USERRA claim. The Court should not exacerbate that delay.

The petition for a writ of certiorari should be denied.

STATEMENT

1. Congress enacted the VEOA, 5 U.S.C. § 3330a, "to assist veterans in obtaining gainful employment with the federal government and to provide a mechanism for enforcing this right." Pet. App. 18a. Congress intended the VEOA to simplify and streamline the remedial mechanism by which veterans may

enforce various preferences to which federal law entitles them, including preferential treatment in seeking federal employment. The VEOA, accordingly, "is an expression of gratitude by the federal government to the men and women who have risked their lives in defense of the United States." *Id.*

Under the VEOA, veterans who believe their veterans-preference rights have been violated by the United States government may file a complaint with the Department of Labor (DOL). *See* 5 U.S.C. § 3330a(a)(1)(A). Such a "complaint must be filed within 60 days after the date of the alleged violation." *Id.* § 3330a(a)(2)(A). If unsuccessful before the Secretary, the veteran may then challenge the government's employment determination in the Board, "except that in no event may any such appeal be brought . . . later than 15 days after the date on which the complainant receives written notification from the Secretary." *Id.* § 3330a(d)(1).

2. Respondent John E. Kirkendall is a 100% disabled veteran who suffers from organic brain syndrome. Pet. App. 2a. Mr. Kirkendall joined the United States Army in 1982, and was posted to South Korea in 1984 and 1985. Govt. C.A. App. 50. After his service overseas, he served as Commander of a Direct Support Platoon at Fort Bragg, North Carolina, and as a Force Integration Officer and an Executive Officer/Commander at Fort Bliss, Texas. *Id.* at 39-40, 49-52. He was honorably discharged from the Army in 1990, having achieved the rank of Captain. His disability arises from a cerebral hemorrhage that occurred during his service in the Army, and has resulted in the paralysis of the left side of his body. *Id.* at 67.

In 1999, Mr. Kirkendall applied for a position as a Supervisory Equipment Specialist (Aircraft) with the Army at Fort Bragg. His service and resulting disability entitled him to a 10-point veterans preference under federal law. Pet. App. 2a. In support of his application, Mr. Kirkendall submitted a two-page resume noting his experience in aviation maintenance. Govt. C.A. App. 39-40. The resume detailed, for example, that Mr. Kirkendall had held a job at Fort Bragg virtually identical to the position offered; in that job he had supervised 30 enlisted men and women and five officers. *Id.* at 39. He also submitted an evaluation from his supervisor, who stated that "Captain Kirkendall is an extremely talented officer who possesses superb skills" and recommended that he "be promoted to Major and command an aviation maintenance unit." *Id.* at 42.

In January 2000, the Army informed Mr. Kirkendall in writing that it had rated him "Ineligible" for the position purportedly because his application lacked "details of [his] experience relating to [the offered] position." *Id.* at 46. Mr. Kirkendall requested reconsideration. *Id.* at 47. The regional employment office advised him in writing to "[e]xpand on [his] duties as Aviation Maintenance Chief" and more fully discuss his experience and responsibilities. *Id.* at 48. Mr. Kirkendall submitted a revised four-page resume that incorporated these suggestions. *Id.* at 49-52.

The Army again rated Mr. Kirkendall "Ineligible," once again asserting a lack of detail in his application. *Id.* at 56. A follow-up letter sent by an Army official stated that Mr. Kirkendall's resume was deficient because "[t]he duties reflected under each job title were indescriptive and inconclusive in describing how the tasks were actually performed/executed in relation to the duties required by

this position." *Id.* at 57. Mr. Kirkendall e-mailed the director of the regional employment office, asking why he had been rated "Ineligible" in light of his expanded resume. *Id.* at 58, 64. In an e-mail response, the director admitted that Kirkendall "most likely [has] the necessary qualifications for the position in question." *Id.* at 65. The director did not indicate that Kirkendall's resume insufficiently detailed the duties performed in each prior job, but noted that the resume was deficient because it should have included the starting and ending months for the various jobs—not just the years. *Id.* The director identified no other reason for the "Ineligible" rating. Another candidate, a 30% disabled veteran, was selected for the position. Pet. App. 3a.

3. Proceeding *pro se*, Mr. Kirkendall filed a complaint with the DOL, alleging that the Army had violated his veterans-preference rights under the VEOA. Govt. C.A. App. 5. The DOL advised him that his complaint was untimely because it was not filed within 60 days of the alleged VEOA violation, as required by 5 U.S.C. § 3330a(a)(2)(A). Pet. App. 140a-141a.

On June 13, 2002, Mr. Kirkendall sought review of the Army's refusal to hire him in the Merit Systems Protection Board. Mr. Kirkendall renewed his VEOA claim, and also separately contended that the Army had unlawfully discriminated against him in violation of USERRA. An administrative judge dismissed Mr. Kirkendall's VEOA claim as untimely and also dismissed his USERRA claim. *Id.* at 133a-134a. The full Board eventually affirmed that decision.

4. Still proceeding *pro se*, Mr. Kirkendall sought review in the Federal Circuit. A divided panel of

that court reversed the Board's decision. *Id.* at 89a. The majority held that the 60-day time period set forth in 5 U.S.C. § 3330a(a)(2)(A), and the 15-day time period set forth in 5 U.S.C. § 3330a(d)(1)(B), were both subject to equitable tolling under the standard established in *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95-96 (1990). The panel also held that Mr. Kirkendall was entitled to a hearing on his separate USERRA claim. It thus remanded the case to the agency "to assess whether Kirkendall's disability prevented him from complying with the filing requirements," *id.* at 97a, and for the Board to hold a hearing on his USERRA claim. Judge Dyk dissented from both rulings.

5. The Federal Circuit granted the government's request for rehearing en banc, and appointed the undersigned *pro bono* counsel for Mr. Kirkendall. *Id.* at 86a-87a. The en banc panel agreed with the panel's holding in both respects, ruling not only that the time limits in the VEOA were amenable to equitable tolling, but also that Mr. Kirkendall is entitled to a hearing on his USERRA claim. *Id.* at 2a.

The court rested its equitable tolling holding on the framework articulated in *Irwin*. The court reasoned that "Kirkendall's VEOA claim is sufficiently analogous to private actions brought under Title VII of the Civil Rights Act of 1964 . . . to invoke the presumption that equitable tolling applies here." *Id.* at 8a-9a. Applying the *Irwin* presumption, the court considered in detail the purpose, structure, and language of the VEOA, and concluded that it contained no "clear or emphatic evidence of Congress' intent to foreclose equitable tolling under section 3330a(d)(1)(B)." *Id.* at 10a; *see also id.* at 9a-18a. Judge Gajarsa concurred separately to provide addi-

tional reasons supporting the court's equitable-tolling ruling. *Id.* at 29a-43a.

Judge Moore concurred in part and dissented in part. She agreed with the en banc majority that the *Irwin* presumption applied to the VEOA. But Judge Moore argued that Congress had clearly rebutted that presumption by, among other things, including the words "in no event" in the statutory text. *See id.* at 43a, 46a-48a. Judge Moore agreed, however, that Mr. Kirkendall was entitled to a hearing on his USERRA claim. *Id.* at 58a-62a. Judge Bryson also dissented, expressing the view that Mr. Kirkendall was not (contrary to the majority's ruling) entitled to a hearing on his USERRA claim. *Id.* at 63a-80a. Judge Dyk, writing only for himself, dissented separately. *Id.* at 80a-85a.

REASONS FOR DENYING THE PETITION

I. The Federal Circuit's Decision Is Correct And Conflicts With No Decision Of This Court Or Any Other Court

The decision below is correct and conflicts with no decision of this Court or any other court of appeals. Indeed, the government scarcely even attempts to satisfy traditional certiorari criteria. The government's petition contends instead that Congress clearly forbade veterans from obtaining equitable tolling of the 15-day time period for bringing a VEOA case in the MSPB. Pet. 16-22. The Federal Circuit correctly rejected that argument.

A. The Federal Circuit correctly applied this Court's precedent on equitable tolling

In 1990, this Court clarified a drafting rule against which Congress has legislated ever since. Absent clear indication to the contrary, statutory time limits governing suits against the federal government—even those phrased in mandatory terms—may be equitably tolled in lawsuits that are arguably (though not necessarily precisely) analogous to a private lawsuit. *Irwin*, 498 U.S. at 95; *Scarborough v. Principi*, 541 U.S. 401, 422 (2004). Congress enacted the VEOA just eight years later, against the background of that settled presumption, and nothing in the VEOA rebuts it, much less clearly so.

The *Irwin* presumption of equitable tolling squarely governs the time limits in the VEOA. As the three-judge panel and 13-judge Federal Circuit en banc panel unanimously recognized, a VEOA suit in the MSPB is strikingly analogous to a private Title VII lawsuit in United States district court. Pet. App. 8a-9a (majority opinion); *id.* at 44a (Moore, J., concurring in part and dissenting in part); *id.* at 93a (panel majority); *id.* at 102a (Dyk, J., dissenting). Both Title VII and the VEOA vindicate employment rights against the federal government, and do so in parallel ways. As Judge Gajarsa pointed out, *id.* at 30a-31a, a Title VII private claimant, for example, must first file a complaint with the EEOC, and only then may file a private suit in federal district court. *See* 42 U.S.C. § 2000e-5(e), (f)(1). Equitable tolling applies to both of those deadlines. *Irwin*, 498 U.S. at 95. Like a Title VII claimant, a VEOA claimant must first file a complaint with the DOL, and if the

DOL is unable to resolve the complaint, then may bring an action in the MSPB.[1] Because that remedial structure is precisely analogous to the structure of Title VII, this Court should presume that the time limits in the VEOA may be equitably tolled just like the time limits in Title VII.

The Federal Circuit correctly ruled that nothing in the VEOA clearly rebuts that presumption. The factors this Court has previously employed to rebut the *Irwin* presumption do not apply to the time limits in the VEOA. For example, in *United States v. Brockamp*, 519 U.S. 347 (1997), this Court concluded that the statute of limitations for filing federal tax refund claims precluded equitable tolling. The Court found that this statute—which employed the word "shall," 519 U.S. at 350—"set[] forth its time limitations in unusually emphatic form," not because the statutory language was absolute, but rather because Congress gave a number of structural signals that tolling was precluded. *Id.* at 350-53. For example, the tax statute in *Brockamp* set forth the time period in a "highly detailed technical manner," repeated that time limit several times, and set forth explicit exceptions to the time limit. *Id.* at 350-51. The Court also emphasized the obvious administrative

[1] The government disputes this analogy between the VEOA and Title VII in a two-sentence footnote. "[T]he VEOA," the government says, "does not directly prohibit *discrimination* against veterans, but instead merely provides a mechanism for enforcement of veterans' *preference* rights." Pet. 17 n.5 (emphasis in original). But as the government recognizes, a "precise private analogue" is not required for the *Irwin* presumption to govern a suit against the government. *Id.* (quoting *Scarborough v. Principi*, 541 U.S. 401, 422 (2004)). The similarities between Title VII and the VEOA easily satisfy that lenient standard.

problems that would be caused by permitting equitable tolling for the hundreds of millions of tax-refunds claims filed each year. *Id.*

The Federal Circuit faithfully followed that analysis in this case. The 15-day time limit in the VEOA is not structured in "unusually emphatic" terms like the statute in *Brockamp*. Pet. App. 6a-23a. Section 3330a is miles away from being "detailed, technical, or repeated": like many limitations periods that are routinely held subject to tolling, the 15-day time limit in the VEOA is stated in straightforward, simple terms in a single subsection. *Id.* at 16a-17a. Section 3330a also contains no explicit exceptions that might suggest that Congress deliberately considered, yet rejected, equitable tolling. *Id.* at 17a.[2] The statute in addition is relatively short—far shorter than other statutes this Court has held to foreclose equitable tolling. *Id.* Finally, the Federal Circuit noted that the purpose of the VEOA's administrative scheme—which is "an expression of gratitude by the federal government to the men and women who have risked their lives in defense of the United States"—and the fact that many veterans proceed *pro se* both support permitting equitable tolling. *Id.* at 18a. Those features are all the more persuasive in this case, which is governed by the "canon that veterans' benefits statutes should be construed in the veteran's favor." *Id.* at 17a, 22a (citing, among other cases, *King v. St. Vincent's Hospital*, 502 U.S. 215, 220 n.9 (1991)). A straightforward application

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[2] The government did not contend below, and does not contend here, that permitting equitable tolling of the VEOA's time limits would create administrative problems comparable to permitting equitable tolling for the tax-return deadlines at issue in *Brockamp*.

of the factors this Court considered in *Brockamp* therefore shows that the time limits in the VEOA may be equitably tolled.

B. The VEOA's mandatory language is insufficient to rebut the *Irwin* presumption

The government barely discusses the multi-factor analysis that this Court conducted in *Brockamp* to establish that a statute emphatically precludes tolling. Instead, the United States attaches talismanic significance to the fact that the 15-day time limit is phrased in mandatory terms. Pet. 18-19. But the text of *all* time limits is mandatory; otherwise they would not be "limits." The government's "textual" theory would render *all* tolling doctrine nugatory. Indeed, *Irwin* made clear that mandatory language alone does not foreclose equitable tolling. When considered against the backdrop of the *Irwin* drafting rule, therefore, the government's heavy reliance on the categorical language in the VEOA is utterly misplaced.

This Court has repeatedly held that "a time limit may be phrased in seemingly categorical terms but still be subject to equitable tolling." Br. for the United States as *Amicus Curiae* Supporting Resp't, *Bowles v. Russell*, 127 S. Ct. 2360 (2007). The examples are legion. In *Irwin* itself, this Court explained that a statute providing that "[e]very claim . . . *shall be barred* unless the petition . . . is filed within six years," did not clearly indicate that Congress intended every such action to be barred within the time period. 498 U.S. at 95 (emphasis added and quotation marks omitted). In *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), this Court like-

wise held that the time limit on filing a Title VII charge with the EEOC—which provided the charge "*shall be filed*" within a time certain—was subject to equitable tolling. *Id.* at 393-94 & n.10 (emphasis added). And in *Scarborough*, this Court ruled that a time limit providing that fee applications pursuant to the Equal Access to Justice Act "shall" be filed and "shall" contain certain allegations was subject to equitable exceptions. 541 U.S. at 407-08, 420-23. All of those time limits employed the word "'shall,'" which "normally creates an obligation impervious to judicial discretion." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (citing *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947)). Yet this Court never wavered from the rule that such absolute, facially exceptionless language does *not* foreclose equitable exceptions.

Similarly, in *Young v. United States*, 535 U.S. 43, 50 (2002), this Court—at the United States' urging—unanimously fashioned an equitable exception to the facially mandatory three-year "lookback period" for discharging a federal tax liability in bankruptcy. On its face, that statute excepted the discharge of *any* federal tax liability for which a return was due within three years of the filing of the bankruptcy petition. *See Young*, 535 U.S. at 46. Despite the mandatory, unqualified language of that exception, this Court held that the pendency of a prior bankruptcy petition equitably tolled that deadline. *Id.* at 47. To reach that result consistent with the Bankruptcy Code's absolute language, this Court relied on *Irwin*, noting the rule that Congress drafts such time peri-

ods in light of the presumption in favor of equitable tolling. *Id.* at 49-50.[3]

The mandatory language this Court repeatedly held to permit equitable tolling in those cases is indistinguishable from the language in the 15-day period in the VEOA. The VEOA provides that "in no event" may any VEOA claim be brought after a certain time. 5 U.S.C. § 3330a(d)(1). But language providing that certain claims "shall be barred"—which the government apparently concedes is not sufficiently emphatic to foreclose equitable tolling, Pet. 18—or providing that "no" claims may be filed after a date certain, on their face are as mandatory and unforgiving of exceptions as the words "in no event." That is no doubt why the government conceded below that the mandatory language in the 60-day time limit on filing a VEOA claim with the DOL—which provides that such claims "must be filed within 60 days," 5 U.S.C. § 3330a(a)(2)(A)—"on its face, could be interpreted as being susceptible to equitable tolling." Br. for Resp't Dep't of the Army at 25, *Kirkendall v. Dep't of the Army*, 479 F.3d 830 (Fed. Cir. 2007) (en banc).

That concession was correct, for "Congress must be presumed to draft limitations periods in light of" the presumption that mandatory language, by itself, is insufficient to foreclose equitable tolling. *Young*, 535 U.S. at 49-50. Congress enacted the VEOA just

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[3] This analysis is by no means a novelty introduced by *Irwin*; it has long been this Court's approach to supposedly "mandatory" deadlines. In, for example, *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959), this Court permitted equitable tolling of a statute that provided that "*[n]o* action shall be maintained . . . unless commenced within three years." *Id.* at 231 (emphasis added and internal quotation marks omitted).

eight years after *Irwin*, and therefore presumably followed the convention established in those cases: that facially absolute language alone does not foreclose equitable tolling. *See* Pet. App. 40a-41a (Gajarsa, J., concurring). As the Federal Circuit properly recognized, therefore, the "in no event" language "is little more than a neutral factor" in the analysis. *Id.* at 10a.

The government accuses the Federal Circuit of imposing "a 'magic words' requirement" that comes "perilously close" to requiring Congress "to state in the text of the statute 'equitable tolling shall not apply' in order to preclude tolling." Pet. 20. But that is not so. Congress easily may foreclose equitable tolling without resorting to incantations. For example, Congress could—as this Court has held it to have done several times—evince its intent to foreclose tolling by creating explicit exceptions—equitable or not—to the time limit, *see* Pet. App. 13a-14a, or by drafting a time limit in detailed, technical, or repeated terms, *see id.* at 16a-18a. In addition, Congress is well aware that the *Irwin* presumption only applies to suits against the government that contain an arguable private-suit analogue. *See id.* at 6a-8a. The Federal Circuit's reasoning is inapplicable to statutes that lack such an analogue. Indeed, it is the *government* that asks this Court to rule that the phrase "in no event" magically transmutes a time limit into an absolute bar, while equally absolute language such as "shall be barred" or "must be filed" does not.

The government also relies on *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), in which the Court declined to permit equitable tolling of a time requirement borrowed from three separate statutes of limitations in the securi-

ties laws, one of which used the words "in no event." *See* Pet. 18-19. But *Lampf* did *not* reach that holding via a "strict[] construc[tion]," *id.* at 18, (or, indeed, *any* "construction") of the words "in no event"; in fact, only one of the three time limits *Lampf* held to foreclose equitable tolling *even contained* that phrase. *See* 501 U.S. at 360 nn.6-7.

Instead, *Lampf*'s reasoning depended on the statutes' structure, which is nothing like the VEOA. The statutes in *Lampf* provided that a securities fraud action could either be brought within one year of the date the plaintiff discovered the violation, *or* within three years of the violation. *Id.* Those time periods were not subject to equitable tolling, the Court held, because the three-year period, in effect, served as an exception to the one-year limitations period; "the three-year period," the Court explained, therefore "can have no significance in this context other than to impose an outside limit." *Id.* at 363 (internal quotation marks and citation omitted). The VEOA, as the Federal Circuit recognized, contains no such exception or "outside limit." *See* Pet. App. 17a.

C. The VEOA's 15-day time limit is not an inflexible "appellate deadline"

Citing Judge Dyk's lone dissent below, the government in addition argues that the 15-day time period in the VEOA is not subject to equitable tolling because it is "a time limit for appellate review, rather than a time limit for the initiation of a claim." Pet. 21. This Court's precedents, however, create no *per se* rule that an "appellate" time deadline is *ipso facto* immune from equitable tolling. On the contrary, in *Bowen v. City of New York*, 476 U.S. 467, 478 (1986), this Court squarely held that the time period on appealing a decision by the Secretary of

Health and Human Services to deny Social Security benefits was subject to equitable tolling. And contrary to the government's suggestion, *id.* at 15 n.3, *Bowen* explicitly described that 60-day period as a time for "seek[ing] judicial review" of the Secretary's decision, and therefore recognized it was an appellate deadline. 476 U.S. at 473; *see also* Pet. App. 21a & n.9. The Federal Circuit relied on *Bowen* for this precise proposition. Pet. App. 21a-22a. Since the government cannot reasonably suggest that *Bowen* be reconsidered—and has made no such suggestion—*Bowen* forecloses the government's argument here.

In any event, the 15-day period on bringing a claim before the MSPB is not an inflexible "appellate" deadline under this Court's precedents. The VEOA provides that claimants must first file a claim with the DOL, and then, only after exhausting that remedy, may file a claim with the Board. But when it hears such a claim the Board is not "reviewing" the DOL's decision; what is being "appealed" is simply "the alleged violation," 5 U.S.C. § 3330a(d)(1)—in other words, the lawfulness of the employing agency's determination. In that respect, the 15-day period on filing such a claim with the Board is *precisely* parallel to the remedial scheme of Title VII, which provides that a claimant may file a claim in district court only after an unsuccessful attempt to obtain relief from the EEOC. *See also supra* pp. 8-9. Equitable tolling applies to Title VII's time limits. *See Irwin*, 498 U.S. at 95. It follows that tolling applies to the VEOA's time limits as well.

II. This Case Is Inappropriate For Plenary Review

The government argues, with almost palpable lack of enthusiasm, that this Court should grant ple-

nary review of the question of whether the 15-day time limit on filing a VEOA case in the MSPB should be equitably tolled. Pet. 22-23. But that question implicates no circuit split, or important question of federal law; and even if it did, this case would be an inappropriate vehicle to decide it.

A. This case presents no important question meriting plenary review

The government has abandoned its contention—advanced vigorously in its petition for rehearing en banc before the Federal Circuit and in its en banc merits brief—that the Federal Circuit's decision implicates any circuit split. *Id.* at 23. Instead, the government half-heartedly argues that the Federal Circuit's holding is "of threshold importance to the administration of the VEOA remedial scheme" with "nationwide effect," and will adversely impact other filing deadlines within the Federal Circuit's jurisdiction. *Id.* at 22-23. The government's petition, however, amounts to little more than a request for the correction of a supposed error that will have little impact outside, or even within, the unique statutory scheme of the VEOA.

The Federal Circuit's decision is unlikely to impact statutes other than the VEOA. The Federal Circuit employed a highly context-sensitive analysis to conclude that the time limits in the VEOA were subject to equitable tolling, and that analysis is not easily transferable to other statutes. *See supra* pp. 8-11. For example, the VEOA is a statute that protects veterans, and the Federal Circuit squarely rested its holding on this Court's "canon that veterans' benefits statutes should be construed in the veteran's favor." Pet. App. 22a (citing, among other cases, *King v. St. Vincent's Hospital*, 502 U.S. 215,

220 n.9 (1991)). Certainly the statutes the government cites as evidence of the supposedly significant effect of the Federal Circuit's holding, Pet. 23, are not comparable to the 15-day limit of the VEOA. Those provisions arise in different schemes and have entirely different language than the VEOA's 15-day appeal provision. Two of those time limits, for instance, have express exceptions, unlike the VEOA. *See* 5 U.S.C. § 1214(a)(3)(B); 29 U.S.C. § 255(a). Reviewing this case will therefore settle no significant question of federal law outside of the VEOA.

The government also vastly overstates the "nationwide" impact of the Federal Circuit's ruling on the administration of the VEOA itself. Pet. 23. While the Board does have eight regional offices throughout the United States, http://www.mspb.gov/sites/mspb/pages/Contact.aspx, its VEOA caseload is not substantial. To illustrate, DOL received 527 VEOA complaints in FY 2005, 21 of which were withdrawn. This number is skewed by the fact that one claimant filed 156 complaints in August 2005. *See* Office of the Assistant Secretary for Veterans' Employment & Training, U.S. Dep't of Labor, FY 2005 Annual Report to Congress 23 (2007), *available at* http://www.dol.gov/vets/media/FY2005_Annual_Report_To_Congress.pdf. In other words, DOL that year decided complaints brought by some 350 veterans, many of whom presumably did not seek review from the Board. By contrast, the Board decided 8,440 cases in FY 2005—6,847 decisions by administrative law judges at the regional offices, and 1,593 decisions by the full Board. U.S. Merit Systems Protection Board, Annual Report Fiscal Year 2005 (np), http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=278041&version=278351&application=ACROBAT. Therefore, even assuming all 350 veterans

sought review—though that number is undoubtedly much lower—VEOA claims constitute approximately four percent of the Board's docket.

The number of VEOA cases in which the question presented is even relevant is smaller still. Even of these VEOA claims before the Board, a large number are filed on time, so the Board need only evaluate whether equitable tolling applies in a much smaller subset of that small fraction of its docket. And even in untimely filed VEOA appeals, the question presented matters only if a litigant is actually entitled to equitable tolling—an infrequent occurrence. *See, e.g.*, *Irwin*, 498 U.S. at 96. This Court has better uses of its scarce resources than deciding an issue that will impact only a tiny fraction of cases filed in a single administrative court that is rarely relevant, let alone outcome determinative.

B. This case would not be a good vehicle to review the question presented even were that question certworthy

Even if the question presented merited this Court's attention in the abstract, this case would be an inappropriate vehicle in which to decide it.

First, the interlocutory posture of this case strongly counsels against immediate review. The Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Va. Military Inst. v. United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of certiorari). This case flunks that requirement: the Federal Circuit remanded the case to the Board for further proceedings on Mr. Kirkendall's VEOA and USERRA claims. Should Mr. Kirkendall prevail on remand,

the United States may seek review of the Board's decision in the Federal Circuit, *see* 5 U.S.C. § 7703(d), and in this Court. Its request for review now is premature.

Second, the government has *not* asked this Court to review a closely related, threshold jurisdictional issue that could preclude this Court from ever reaching the question presented. Below, the United States contended that the Board lacked jurisdiction to hear Mr. Kirkendall's appeal because Mr. Kirkendall had not met the 60-day time limit on filing a VEOA claim with the DOL. Br. for Resp't Dep't of the Army at 30-37, *Kirkendall v. Dep't of the Army*, 479 F.3d 830 (Fed. Cir. 2007) (en banc). The Federal Circuit properly rejected that contention, Pet. App. 4a-6a, and the government's petition does not renew it—no doubt because the government recognizes that that question is insufficiently important to warrant review. If the government's position that the 60-day time limit is jurisdictional is taken seriously, this Court might well need to decide that question as a threshold matter in this case. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998). If it does, the Court may never reach the question the government's petition purports to present.

Regardless of whether the 60-day period on filing a VEOA claim with the DOL is jurisdictional, the government's failure to seek review of it in this case still makes this case a poor vehicle in which to decide whether the VEOA's 15-day time limit is subject to equitable tolling. The 60-day time limit for filing VEOA claims with the DOL, and the 15-day time limit on filing VEOA claims with the MSPB following a DOL decision are closely related, and the Federal Circuit's en banc decision reviewed those questions

together. Pet. App. 9a-10a, 16a. This Court should await a petition that presents both before reviewing either. This petition, however, presents only the latter question.

III. This Court Should Not Grant, Vacate, And Remand This Case In Light Of *Bowles*

The government argues that the Court should GVR this case in light of this Court's recent decision in *Bowles*. Pet. 11-16. But this case has nothing to do with *Bowles*.

Relying on this Court's "longstanding treatment" of time limits on appealing from Article III district courts as "mandatory and jurisdictional," *Bowles* held that a habeas petitioner's failure to file a notice of appeal within the 14-day reopening period deprived the court of appeals of jurisdiction. 127 S. Ct. at 2363-66. That holding is consistent with, and does not significantly affect, the Federal Circuit's analysis here. A GVR in light of *Bowles* is therefore unwarranted.

A GVR in light of an intervening decision of this Court is appropriate only if there is "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation." *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam). Moreover, "if the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court, a GVR order is inappropriate." *Id.* at 168. A GVR is clearly inappropriate under those criteria.

A. *Bowles* does not undermine the Federal Circuit's decision

As an initial matter, *Bowles* undermines no significant premise of the Federal Circuit's decision. The Federal Circuit did, of course, reject the government's contention that the 15-day time limit on filing an appeal with the MSPB is "mandatory and jurisdictional." Pet. App. 18a-22a. *Bowles* does not, however, cast doubt on the Federal Circuit's reasoning on that score. *Bowles* simply held, based on the specific structure of the statute before it and based on this Court's tradition of treating notices of appeal as jurisdictional, that the time for reopening an appeal from a district court's decision was mandatory and jurisdictional. 127 S. Ct. at 2366. The Federal Circuit went out of its way to reconcile its holding with that tradition.

The Federal Circuit conceded that "some provisions specifying the time for review are not subject to equitable tolling" because they are mandatory and jurisdictional Pet. App. 20a. Nonetheless, the Federal Circuit concluded that the structure of the VEOA did not support the conclusion that it was mandatory and jurisdictional like those statutes. *Id.* at 19a-20a. It distinguished its decision in *Oja v. Department of the Army*, 405 F.3d 1349 (Fed. Cir. 2005), *see id.* at 21a, which applied reasoning nearly identical to *Bowles*'. Relying on the rule that a notice of appeal from a United States District Court is "mandatory and jurisdictional," *Oja* held that the time limit on petitioning for judicial review from a decision of the MSPB to the Federal Circuit was not subject to equitable tolling. 405 F.3d at 1358-60. Judge Dyk's dissent, indeed, heavily relied upon the very court of appeals decision that *Bowles* affirmed. Pet. App. 82a. In other words, the Federal Circuit

has already considered, and rejected, the contention that the reasoning of *Bowles* changes the outcome of this case.

The government contends that the Article III appellate deadline *Bowles* held to be "mandatory and jurisdictional" shows that the VEOA's 15-day administrative deadline is as well. Pet. 13-16. As the government points out, both the VEOA's deadlines and the deadline in *Bowles* are "set out in a statute enacted by Congress, not simply in a rule adopted by a court or tribunal." *Id.* at 13. But this Court has repeatedly held that time limits set forth in statutes duly enacted by Congress are *not* "jurisdictional prerequisites" to suit, but instead are subject to "waiver, estoppel, and equitable tolling." *Zipes*, 455 U.S. at 393; *see Hallstrom v. Tillamook County*, 493 U.S. 20, 27 (1989); *Honda v. Clark*, 386 U.S. 484, 501 (1967); cases cited *supra* pp. 11-13. The Federal Circuit correctly relied on that line of cases, Pet. App. 10a-18a, which *Bowles* did not mention, let alone overrule.

The government submits, however, that the 15-day time limit in the VEOA, like the one in *Bowles*, "governs the transfer of a case from one tribunal to another . . . and thus defines the class of cases that the appellate tribunal is competent to hear." Pet. 13-14. But *Bowles* cannot mean that *any* statute that "governs the transfer of a case from one tribunal to another" in *any* case is "mandatory and jurisdictional." On the contrary, where, as here, a claimant is seeking review after the decision of an *administrative adjudicator*, as opposed to the Article III district court at issue in *Bowles*, this Court has held that the time for seeking review is subject to equitable tolling.

In *Irwin*, for instance, this Court held that the statute governing the time for filing a Title VII ac-

tion in district court after a claimant's unsuccessful attempt to obtain relief from the EEOC is *not* "mandatory and jurisdictional." 498 U.S. at 95. Again, the VEOA's 15-day time limit governs the "transfer" of a case from the DOL to the MSPB in precisely the same sense that Title VII's time limit on filing a discrimination claim in federal court governs the transfer of a case from the EEOC to federal court. *See supra* pp. 8-9. And once again, in *Bowen*, this Court squarely held that a statute governing the transfer of a case from the Secretary of Health and Human Services to federal court "is not jurisdictional, but rather constitutes a period of limitations." 476 U.S. at 478. The Federal Circuit squarely relied on those cases to reach its judgment, Pet. App. 21a-22a, and *Bowles* leaves them untouched.

Finally, the government contends that the 15-day time limit is "mandatory and jurisdictional" within the meaning of *Bowles* because it "is contained in the same statutory section that contains the general grant of jurisdiction to the MSPB." Pet. 14. But that a time limit appears in a "grant of jurisdiction" does not make it immune from equitable tolling. For example, *Irwin*, *Scarborough*, and *Zipes* all allowed equitable tolling of time limits that appeared in statutory provisions waiving the sovereign immunity of the United States. "Sovereign immunity is jurisdictional in nature" and "the 'terms of the [United States'] consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *FDIC v. Meyer*, 510 U.S. 471, 475 (1994) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). Yet those cases, and others, reject the government's notion that the presence of such a provision in a grant of jurisdiction, standing alone, makes it mandatory and jurisdictional. In *Henderson v. United*

States, 517 U.S. 654 (1996), to take another example, this Court squarely rejected the government's argument that a time period for serving the United States with process was "mandatory and jurisdictional" simply because it appeared in a statute waiving the sovereign immunity of the United States. *Id.* at 671-72. Indeed, the *Irwin* presumption *always* involves a "jurisdictional" statute, since it applies only to "suits against the Government." 498 U.S. at 95.

In any event, there is a world of difference between a grant of jurisdiction to the MSPB—an administrative adjudicator—and the notice of appeal provision at issue in *Bowles*, which governed the jurisdiction of an Article III appellate court. As *Bowles* noted, there is a long tradition of construing the deadline for appealing a case from one Article III court to another as "mandatory and jurisdictional." 127 S. Ct. at 2362. Not only is there no comparable tradition construing the deadline for filing a case in an administrative body that way, but there is also good reason not to begin one in this case.

Administrative deadlines are not the same as judicial ones. As Judge McConnell has explained, "the authority of a federal regulatory commission"—no less than any other administrative agency—"is not analogous to the subject-matter jurisdiction of a federal court." *Fuel Safe Wash. v. FERC*, 389 F.3d 1313, 1333 (10th Cir. 2004) (concurring opinion). The principle that "challenges to the subject matter jurisdiction of the federal courts . . . cannot be waived by the parties . . . is grounded in 'the nature and limits of the judicial power of the United States,' which is constitutional in nature, and 'inflexible and without exception.'" *Id.* (quoting *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 382 (1884)). By contrast, "[t]he scope of regulatory jurisdiction . . . is

a matter of policy for Congress to decide." *Id.* In interpreting the boundaries of an Article III court's jurisdiction, therefore, courts must tread carefully. Those constitutional concerns are absent in this case, which involves the scope of the jurisdictional grant to an administrative adjudicator, the MSPB. Thus, the deadline for filing a discrimination charge with the EEOC, another administrative body, may be equitably tolled—even though that time period appears in the same section of the statute granting the EEOC jurisdiction over charges. *See Zipes*, 455 U.S. at 389 n.2, 393-94.

In the end, the government's arguments set up a diametric conflict between *Irwin* and *Bowles*, all but inviting this Court to overrule not only *Irwin*, but also its numerous predecessors and progeny that explicate and apply *Irwin*'s strong presumption in favor of equitable tolling. But those cases are perfectly consistent with *Bowles*. The *Irwin* presumption "govern[s] the applicability of equitable tolling in suits against the [federal] Government," 498 U.S. at 95, and only then when there is a sufficiently analogous private lawsuit to that federal-government suit, *Scarborough*, 541 U.S. at 422. *Bowles*, however, involved a federal habeas corpus petition by a state prisoner. The federal government was not the defendant in that case, and even had it been, there is no arguable private-suit analogue to a habeas corpus action. *Irwin* was beside the point in *Bowles*—which is why the Court in *Bowles* did not cite that decision. But *Irwin* squarely governs this case, and compels the conclusion that the time limits in the VEOA are subject to equitable tolling, as the Federal Circuit properly ruled. *See* Pet. 6a-18a, 28a-43a (Gajarsa, J., concurring).

B. Granting, vacating, and remanding this case in light of *Bowles* is not in the interest of judicial economy

A GVR in light of *Bowles* is also inappropriate in this case because "the delay and further cost entailed in a remand [is] not justified by the potential benefits of further consideration by the lower court." *Lawrence*, 516 U.S. at 168.

A GVR in light of *Bowles* would delay these proceedings with little corresponding benefit. Because this case has been remanded to the Board, the Federal Circuit will have an opportunity to reconsider its equitable-tolling holding in light of *Bowles* after Mr. Kirkendall prevails on his claims. *See supra* pp. 19-20. If the government is correct that *Bowles* is controlling here, the Federal Circuit would have ample opportunity to consider the effect of *Bowles* on its judgment, since the Federal Circuit adheres to the rule that otherwise-binding circuit precedent can be reconsidered if "undermined by intervening Supreme Court . . . authority." *Doe v. United States*, 372 F.3d 1347, 1354 (Fed. Cir. 2004); *see also Teva Pharms. USA, Inc. v. Novartis Pharms. Corp.*, 482 F.3d 1330, 1338 (Fed. Cir. 2007); *Atl. Thermoplastics Co. v. Faytex Corp.*, 970 F.2d 834, 838-39 n.2 (Fed. Cir. 1992).

The government thus stands to gain little from a GVR. It has *not* sought review of the Federal Circuit's ruling that Mr. Kirkendall was entitled to a hearing on his separate and distinct USERRA claim. That claim will therefore proceed regardless of what happens on remand after any GVR. Since there will be further remand proceedings in the Board regardless of whether this Court GVRs the Federal Circuit's equitable-tolling ruling, doing so would do little to preserve the government's resources even were it

somehow to persuade the Federal Circuit that *Bowles* has decisive relevance to its decision.

The cost to Mr. Kirkendall of a GVR, on the other hand, is great. Mr. Kirkendall has been unlawfully denied a hearing on his USERRA claim for years. This Court should not compound that delay so that the Federal Circuit may consider the effect of a decision the relevance of which it has already essentially rejected, and that it will have a chance to consider in any event even were it relevant.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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